

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**IN RE BAAN COMPANY SECURITIES
LITIGATION**

98-2465 (ESH/JMF)

**THIS DOCUMENT RELATES TO ALL
ACTIONS**

REPORT AND RECOMMENDATION

Judge Huvelle has asked for a Report and Recommendation as to the disposition of J.G. Paul Baan's Renewed Motion to Dismiss for Lack of Personal Jurisdiction Pursuant to Federal Rule of Civil Procedure 12(b)(2) and Defendant Vanenburg Group's Renewed Motion to Dismiss for Lack of Personal Jurisdiction Pursuant to Fed. R. Civ. P. 12(b)(2).¹

I recommend that both motions be granted for the reasons stated below.

Applicable Principles of Law

When a defendant challenges the jurisdiction of the court over his person, the case law indicates that the analysis should take place in three distinct stages. First, the court must ascertain whether the allegations in the complaint establish, on a *prima facie* basis, jurisdiction over the defendant's person. Second Amendment Foundation v. U.S. Conference of Mayors, 274 F.3d 521, 523 (D.C. Cir. 2001). If they do, then in this Circuit, the plaintiff, who has the burden of establishing jurisdiction, must be permitted adequate discovery to establish that the court's assertion of jurisdiction over the defendant's

¹ Plaintiffs' claims are described in detail in In re: Baan Company Securities Litigation, 103 F. Supp. 2d 1 (D.D.C. 2000).

person meets statutory and constitutional standards. In re: Baan Co. Securities Litigation, 81 F. Supp. 2d 75 (D.D.C. 2000). At this stage, allegations no longer suffice; plaintiff must "adduce any concrete" evidence that the defendant is subject to the court's personal jurisdiction. First Chicago. Int'l v. United Exchange Co., Ltd, 836 F.2d 1375, 1377 (D.C. Cir. 1988). Accord: GTE New Media Services, Inc. v. Bellsouth Corp., 199 F.3d 1343, 1349 (D.C. Cir. 2000). This proposition is self-evident; if allegations sufficed without discovery, there would be no need for the discovery permitted.

At the final stage, the Federal Rules of Evidence are as operative as they are at any other stage of the proceedings. Thus, as has been specifically held, plaintiff must establish personal jurisdiction by admissible evidence. Barrett v. Lombardi, 239 F.3d 23, 27 (1st Cir. 2001).

The Court's Task

In this case, I have permitted discovery on the jurisdictional issues and defined with precision and in detail the discovery plaintiffs were permitted to take to try to support their allegations as to the court's jurisdiction over the defendant J.G. Paul Baan ("Baan") and Vanenburg Group ("Vanenburg").

Plaintiffs did take the discovery as to Baan but, due to their extraordinary dilatoriness, I was compelled to conclude that they had forfeited the right I had granted them to take discovery from Vanenburg by taking a deposition from a Vanenburg designee pursuant to Fed. R. Civ. P. 30(b)(6). As a result, the analysis as to these two defendants is radically different.

As to Baan, I assess whether the evidence in the form of Baan's affidavits and his deposition support the exercise of personal jurisdiction over him.

As to Vanenburg, I have to determine whether the information tendered in support of plaintiffs' allegations qualifies as evidence. If I conclude that it does not, I then have to determine whether the

information that would qualify as evidence or is admitted to be true by Vanenburg supports the exercise of personal jurisdiction over Vanenburg. I begin with Baan.

Baan's Affidavit

The two affidavits Baan submitted negate, of course, plaintiffs' claim that he has sufficient contacts with the United States. In these affidavits Baan states:

1. He is a citizen of the Netherlands where he has lived all of his life.
2. He has never maintained a residence in the United States nor owned any property in the United States. He has no bank accounts in the United States.
3. He was Managing Director of Vanenburg during the class period; Vanenburg is registered to do business only in the Netherlands. His office is in the Netherlands and he did not have an office in the United States during the class period.
4. Vanenburg did not maintain an office in the United States during the class period. It never employed any staff (other than counsel), signed any leases, had any business addresses, or advertised in the United States during the class period.
5. He never executed any contracts on behalf of Vanenburg in the United States. Baan had little involvement in matters that relate to Vanenburg's sales and accounting. Meetings of Vanenburg's Board of Directors and Board of Managing Directors took place in the Netherlands and never in the United States.
6. He visited the United States on four isolated occasions during the class period to meet with companies that were affiliates or attractive acquisition prospects. Each trip lasted a few days; in all, he spent less than 15 days in the United States in the class period in

connection with this travel.

7. He was never in the United States for any purpose related to any of the activities forming the basis of the fraud alleged in the complaint and he never attended any meetings in connection with any activities in the United States concerning sales of Baan Company products to any of Vanenburg's subsidiaries in the United States.
8. He was a Supervisory Director of the Baan Company through a part of the class period, *i.e.*, until December, 1997 when he ceased being Chairman of the Board of Supervisory Directors. He held no management position with the Baan company and his responsibilities with that company were limited.
9. He did not have an office within the Baan Company's office in the Netherlands nor an office in the United States when he was on the Supervisory Board and the company's Chairman.
10. He came to the United States on one occasion to attend a meeting of the Baan Board of Supervisory Directors but the meeting did not relate in any way to the activities forming the fraud alleged in the complaint. This was the only trip he made to the United States on behalf of the Baan Company in the class period.
11. He had no responsibility for the accounting practices alleged in the complaint nor any knowledge of how the Baan Company reported revenue during the class period or whether its reporting procedures complied with the Generally Accepted Accounting Principles.
12. He never traveled to the United States for personal reasons at any time during the class

period nor conducted any personal business in the United States during the class period. All contacts he had with the United States during the class period were for business purposes on behalf of either the Baan Company or Vanenburg.

The second element of plaintiffs' proof would have to be Baan's deposition, which plaintiffs cite in support of its allegations regarding the validity of the exercise of personal jurisdiction. Unfortunately, the allegations are utterly unsupported by the portions of the transcript as the following chart shows:

Statements by plaintiffs concerning Baan	Baan's deposition testimony
Trips to the United States were made for the express purpose of overseeing the business conducted by Vanenburg's U.S. affiliates as well as the marketing of Baan and its products to businesses domiciled in the United States.	No such testimony was given.
Paul Baan participated in acquiring the Vanenburg affiliates in the United States and had substantial personal holdings in various companies located in Palo Alto, California.	No such testimony was given.
As conceived by Paul and his brother Jaan Baan, Vanenberg's sole purpose was to serve as a shell company to enable Paul Baan, as its Managing Director, to acquire and manage multiple subsidiaries to serve as purported Baan "resellers."	No such testimony was given.
Paul Baan managed Vanenburg's United States operations from abroad.	No such testimony was given.
Paul and Jan Baan were careful to retain complete control of their Vanenburg voting rights when granting the shares to the Stichting Oikonomos Trust, again exemplifying their desire to maintain exclusive control over Baan, through Vanenburg.	No such testimony was given.

Paul Baan was actively involved in reviewing, evaluating, and overseeing the very revenue recognition policies that caused Baan's financial results to be materially false and misleading throughout the class period.	No such testimony was given.
Paul Baan admittedly had numerous telephonic contacts with United States counsel concerning Vanenburg's "strategic business purposes" including making "acquisitions for the Vanenburg group." Citing Tr. 77:11-79:16.	At the pages of the transcripts cited, Paul Baan testified that he communicated with individuals representing acquisition prospects before meeting "not frequently." Tr. 78:13. There is no reference in the cited pages to any conversations with counsel. Baan testified (Tr. 67:8) that he contacted U.S. counsel for Vanenburg for strategic business purposes and not operational purposes. Such strategic business purposes would include purchasing shares in U.S. entities.
In connection with the United States transactions, for the purpose of negotiating and finalizing the terms of these acquisitions, Paul Baan necessarily had telephonic contact with other individuals located in this country.	No testimony that Paul Baan negotiated or finalized the terms of any acquisitions was given.
Paul Baan even arranged for the purchase of United States real estate through one of Vanenburg's Group's affiliates. Citing Tr. at 68:22-69:3.	No such testimony was given. The only testimony at the pages cited is that Vanenburg did not attempt to rent or buy property in U.S. Vanenburg Group affiliate, Baan Real Estate LLC, rented property. No testimony whatsoever that Paul Baan arranged for purchase or rental of property.
Vanenburg served no function other than to allow Paul Baan to acquire new United States affiliates, and the entity, itself, admittedly did no other business. Citing Tr. at 25:14-27:10, 73:12-21, 76:12-77:10.	No such testimony. At cited pages, testimony was that Vanenburg was formed in the Netherlands to do business in the software industry; and is a holding company. No testimony whatsoever that it was formed to acquire United States affiliates.

Vanenburg owned at least 20 Baan affiliates in the United States. Citing Tr. 28:1-30:22.	No such testimony. Testimony at cited page indicates that Vanenburg had stakes in Net Shepherd, Webex, and Top Tier. No reference to twenty such companies.
--	---

To be blunt, the discrepancies in this chart are shocking. I have never seen and I hope that I will never see again such utter mischaracterizations of what a witness actually said or such bold assertions based on absolutely nothing the witness said. Allowing for the haste and the inaccuracies that invariably creep into one's prose when one paraphrases what some one else said, it is still beyond my comprehension how attorneys can, for example, represent that a witness's testimony suggested that he had "substantial personal holdings in various companies located in Palo Atlo, California" when he never used the word "California" in his deposition, let alone stated he had holdings there, nor can I understand how those lawyers can cite a transcript for the proposition that a certain company had twenty affiliates when in the portion of the transcript cited, the witness names only three.

Baan's Motion Should be Granted

When one actually reads what the witness said in his deposition and affidavits and disregards plaintiffs' mischaracterizations of what the witness said, we are back where we started. The only evidence² we have is that Baan is a Dutch citizen who during the class period did absolutely no personal business and had no personal contacts with the United States. He traveled to the United States on four

² Plaintiffs point to documents that impeach Baan's testimony by showing that he had more knowledge of Baan Company's accounting practices than he admitted. Supplemental Memorandum of Law in Opposition to Defendant J.G. Paul Baan's Renewed Motion to Dismiss for Lack of Personal Jurisdiction at 9-13. But, as Baan points out, he was never confronted with these documents during his deposition. There is therefore no evidentiary foundation for the assertion that he knew what was in them. That a document was sent to a person does not mean that the person saw or read it. Without his admission that he saw them, documents sent to him by others cannot impeach him.

brief business trips to do the business of the companies which employed him. He has no property in the United States, no bank account here, and no personal investments here. Simply put, there is no evidence that he ever did any personal business in the United States during the class period. Finally, there is no evidence whatsoever that he participated in the transactions of which plaintiffs complain. Accordingly, whether the question is viewed as one of special or general jurisdiction, the claim that Baan can be subjected to the personal jurisdiction of this court fails.

First, general jurisdiction speaks to such a pervasive personal presence in the forum that the exercise of jurisdiction does not offend fundamental fairness. In re: Baan Co. Securities Litigation, 81 F. Supp. 2d at 81-85. In this case, we have a European citizen who traveled to the United States sporadically and briefly on company business and who otherwise has absolutely no personal contacts with the United States. To suggest that his presence in the United States is as pervasive as Toyota, Sony, or Phillips and that it is as fair to subject him to personal jurisdiction as it is to subject those foreign companies to jurisdiction over their corporate persons is fatuous.

Second, as to special jurisdiction, premised on the defendant's performance of the act that is the premise of liability, there is no evidence whatsoever that Baan personally participated or approved of the transactions complained to be fraudulent. Unless and until there is, there is an utter lack of connection between him, in his personal capacity, and the acts claimed to have harmed plaintiffs.

In this context, it is important to bear in mind that plaintiffs' approach to the personal jurisdiction question has always been premised on the assertion that Baan, as an individual, is subject to personal jurisdiction because of the acts he did or the knowledge he had in his capacity as a controlling shareholder or director of a company that is alleged to have done business in the United States. The

problem with that analysis is that it obliterates the distinction between personal jurisdiction premised on what one person does for himself advancing personal interests and what he does for the entity that employs him or in which he has a substantial, controlling stock interest.

The Supreme Court has emphasized that the validity of the assertion of personal jurisdiction must be premised on the facts pertaining to each individual defendant. Calder v. Jones, 465 U.S. 783, 790 (1984). It therefore follows, for example, that the legitimate assertion of personal jurisdiction over a corporate employer does not mean that the corporate employees are equally subject to personal jurisdiction in that forum. Keeton v. Hustler Magazine, 465 U.S. 770, 781 n.13 (1984); Young v. Sullwold, 2000 U.S. Dist. LEXIS 14047 (Sept. 27, 2000); Nat'l Petroleum Marketing, Inc. v. Phoenix Fuel Co., Inc., 902 F. Supp. 1459, 1469 (D. Utah 1995); United Resources 1988-I Drilling and Completion Program v. Avalon Exploration Inc., 1994 U.S. Dist. LEXIS 152, *13 (S.D.N.Y Jan. 10, 1994). As Judge Harris of this court explained in another case:

A court does not have jurisdiction over individual officers and employees of a corporation just because the court has jurisdiction over the corporation. See Keeton v. Hustler Magazine, 465 U.S. 770, 780 n. 13, 104 S.Ct. 1473, 79 L.Ed.2d 790 (1984); Wiggins v. Equifax, Inc., 853 F.Supp. 500, 503 (D.D.C.1994). Personal jurisdiction over officers of a corporation in their individual capacities must be based on their personal contacts with the forum, not their acts and contacts carried out solely in a corporate capacity. Wiggins, 853 F.Supp. at 503; see also Schwartz, 938 F.Supp. at 6 n. 8. Although plaintiff has proffered evidence that Muammer Agim traveled to the District, engaged in contract negotiations in the District, and ultimately signed a contract with a substantial connection to the District, all these activities were apparently carried out on behalf of defendant PROGEN. See, e.g., Protocol Circular Addendum. Since plaintiff has proffered no evidence that Muammer Agim had personal contact with the District, the Court grants his motion to dismiss for lack of personal jurisdiction.

Overseas Partners, Inc. v. PROGEN Musavirlik ve Yonetim Hizmetleri, Ltd. Sikerti, 15 F. Supp. 2d 47, 51 (D.D.C. 1998).

What other rule could there be? If a New York corporation sends a salesman to Iowa to sell computer software, the corporation's sending him there may subject it to jurisdiction in Iowa because of the salesman's acts but it hardly subjects the salesman to the jurisdiction of the Iowa courts. Whether the salesman is or is not subject to Iowa's jurisdiction is a function of what he did in advancing his own interests while he was in the state.

Additionally, these jurisdictional issues become easier to comprehend when one sees them in an international context and imagines what would happen in a particular situation if, in response to the assertion of personal jurisdiction by a United States court, foreign courts did the same. Unless the distinction between jurisdiction over a corporation based on its activities and jurisdiction over a corporation's directors and officers based on their personal activities is kept true, the Board of Directors of Ford or General Motors would be subject to personal liability in courts worldwide not because of what they did in those countries but because of what Ford or General Motors did. The deleterious consequences of such an inability to distinguish between what a company does in a country through its employees and what the employees themselves do would have staggering implications for international trade. Thus, I persist in my view that personal jurisdiction can only be based on Baan's personal activities in the United States and not on the activities he performed here in service to Vanenburg or the Baan company. It is not, after all, illegal in the United States or the Netherlands to do business in the corporate form. Yet, if the court were to subject Baan to personal liability because of his activities on behalf of Vanenburg and the Baan company, the legitimate limitation of liability

provided by the corporate form would disappear, endangering with personal liability foreign corporate officers and directors who travel to America on company business.

Finally, the fact that American securities law may subject an individual to liability when she controls a corporation that violates that law does not mean that American courts may necessarily subject a foreign investor to its jurisdiction solely because she has the capability by virtue of stock ownership to control that non-American corporation or is a member of its Board of Directors. To conclude otherwise is to confuse a form of statutory liability with a constitutional command that the exercise of personal jurisdiction be fundamentally fair. Whether or not one can control a corporation is one thing; whether that control is in itself an appropriate premise of personal jurisdiction is another. As I have pointed out, potential control of an international corporation doing business in the United States is not in itself an adequate basis for an American court to exercise personal jurisdiction over an individual claimed to have that potential by virtue of stock ownership or membership on the board of directors. In re: Baan Co. Securities Litigation, 81 F. Supp. 2d at 78-79.

Vanenburg's Motion Should Be Granted

In asserting that this court should exercise jurisdiction over Vanenburg, a Dutch corporation, plaintiffs rely on (1) statements by Judge Green in her decision denying the defendants' motion to dismiss, (2) the allegations of their complaint, and (3) newspaper articles. All are, however, insufficient.

First, in ruling on the motion to dismiss, Judge Green took no evidence and made no findings whatsoever. Instead, Judge Green was obliged to take as true the allegations of the complaint and she did so. In re: Baan Company Securities Litigation, 103 F. Supp. 2d at 4. To say that her opinion provides support for certain allegations is to argue in a perfect circle. Allegations that Judge Green had

to take as true do not thereby become true.

Second, as I have explained, we have moved beyond the allegations of the complaint. Plaintiffs must prove that certain facts are true through admissible evidence. If they don't, and if they rely only on the allegations of their complaint, they have not even advanced the ball a foot down the field.

I appreciate that I have had to conclude that plaintiffs have forfeited their right to take the discovery I permitted from a Vanenburg 30(b)(6) designee. Plaintiffs' inability to secure any discovery is a bed of their own making and they must now lie in it.

Third, newspaper articles are hearsay even if they contain a statement that might qualify as an admission against interest. This is so because the truthfulness of the proposition that the party uttered the statement claimed to be an admission is entirely dependent upon the credibility of the reporter who claims to have heard it. Unless the reporter is called to attest to the truthfulness of her assertion that she heard the party make the statement, the newspaper article is, in itself, inadmissible. Larez v. Los Angeles, 946 F.2d 630, 642 (9th Cir. 1991); Wright v. Montgomery County, 2002 WL 1060528 (E.D. Pa., May 20, 2002); Miles v. Ramsey, 31 F. Supp. 2d 869, 875 (D. Colo. 1998); In re Columbia Securities Litigation, 155 F.R.D. 466, 473 (S.D.N.Y. 1994).

Using, once again, a process of reduction, the following statements of fact are the only ones upon which personal jurisdiction could be based because they are themselves based on either legitimate admissions by a party in SEC filings or the testimony of Paul Baan in his deposition, or because Vanenburg concedes their truthfulness:

1. During the class period, Vanenburg, described by Mr. Baan as a holding company, owned a controlling interest in the Baan Company and Mr. Baan and his brother

owned, through a foundation or trust, a substantial beneficial interest in Vanenburg.

2. During the class period, Vanenburg owned a beneficial interest in certain American companies that dealt with the Baan Company. The manner in which the Baan Company accounted for some of these dealings is the gravamen of plaintiffs' complaint.
3. Vanenburg offered shares of the Baan Company for sale on American and European exchanges.

These facts do not, in my view, establish jurisdiction over Vanenburg.

First, I persist in the view articulated in my earlier opinion that mere ownership of a beneficial interest in a corporation, no matter how controlling an interest, does not in itself serve as a premise for the exercise of jurisdiction over the beneficial owner, whether the owner is a human being or a corporation. In re: Baan Company Securities Litigation, 81 F. Supp. 2d at 78-82. Even though plaintiffs continue to rely on a Ninth Circuit decision that is to the contrary, I persist in my view that the Ninth Circuit decision is inconsistent with controlling Supreme Court precedent and therefore wrongly decided.

I further note that it is the law of this Circuit that a parent corporation cannot be subjected to the jurisdiction of a court that does have jurisdiction over its subsidiary merely because the parent owns all of the subsidiary's stock. El-Fadl v. Central Bank of Jordan, 75 F.3d 668, 675 (D.C. Cir. 1996).

It is also the law of the land in those cases where the parent and subsidiary corporations maintain separate and distinct corporate existences and the subsidiary operates independently of the parent. Glenn R. Sarno, Haling Foreign Subsidiary Corporations into Court under the 1934 Act: Jurisdictional Bases and Forum Non Conveniens, 55 Law & Contemp. Probs. 379, 385 (1992)(citing,

inter alia, Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 706 (1988) and RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 52 cmt. b (1969).³ Accord: Cannon Mfg. Co. v. Cudahy, 267 U.S. 333 (1925); Richard v. Bell Atlantic Corp., 946 F. Supp. 54, 68 (D.D.C. 1996); FDIC v. Milken, 781 F. Supp. 226, 230 (S.D.N.Y. 1991). There is no evidence whatsoever that Baan Company, its American subsidiaries, and Vanenburg did not operate independently.

Second, it is unquestionably true that American courts have exercised personal jurisdiction over foreign corporations or nationals when those corporations have performed an act, such as insider trading, that they could have reasonably expected to affect adversely the value of shares purchased on American exchanges. E.g. SEC v. Unifund Sal, 910 F.2d 1028, 1032 (2nd Cir. 1990); SEC v. Softpoint Inc, 2001 WL 43611, *6 (S.D.N.Y. Jan. 18, 2001); SEC v. Euro Security Fund, Coim SA, 1999 WL 76801 (S.D.N.Y. Feb. 17, 1999); Nam Tai Electronics, Inc. v. Tele-Art, Inc., 1994 WL 4438 *1 (S.D.N.Y. Jan. 5, 1994); Compare SEC v. Alexander, 160 F.Supp.2d 642, 654-657 (S.D.N.Y. 2001). Thus, had Vanenburg directed the manner in which the Baan Company accounted for its dealings with the subsidiaries, we would have a different case. The case we have is based solely on a parent's ownership of a subsidiary's stock and the parent's offer of shares of that stock on an American market. No American court has ever held that the parent thereby becomes responsible in an American court for any of the subsidiary's acts that affects the value of the stock. Such a holding,

³ “Subsidiary of corporation. Judicial jurisdiction over a subsidiary corporation does not of itself give a state judicial jurisdiction over the parent corporation. This is true even though the parent owns all of the subsidiary's stock. So a state does not have judicial jurisdiction over a parent corporation merely because a subsidiary of the parent does business within its territory.” RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 52 cmt. b (1969).

creating, *ipso facto*, jurisdiction in American courts over a foreign parent for any act by the subsidiary merely because of the offering by a foreign parent of its subsidiary's stock on an American market, would have staggering implications for international offerings on American exchanges.

CONCLUSION

I therefore find no basis for the assertion of personal jurisdiction over Baan or Vanenburg and recommend the granting of their motions to dismiss.

Failure to file timely objections to the findings and recommendations set forth in this report may waive your right of appeal from an order of the District Court adopting such findings and recommendations. See Thomas v. Arn, 474 U.S. 140 (1985).

JOHN M. FACCIOLA
UNITED STATES MAGISTRATE JUDGE

Dated: